Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-231

EDWIN NACHBAUR,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, POLICE DEPARTMENT CITY OF NEW YORK, WALTER DELLHEIM, ARGO INSTRUMENTS CORP., UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.....

EDWIN NACHBAUR,

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NATIONAL LABOR RELATIONS BOARD, POLICE DEPARTMENT CITY OF NEW YORK, WALTER DELLHEIM, ARGO INSTRUMENTS CORP., UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, EDWIN NACHBAUR, respectfully shows:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 16, 1977.

OPINION OF THE COURT BELOW

The order of the Court of Appeals for the Second Circuit is marked Appendix A, hereto annexed. No opinion was made or entered in connection with said order. The judgment dated October 22, 1976 and the Opinion dated October 15, 1976 made by District Judge Carter in the Southern District of New York, dismissing this case are marked Appendix B, hereto annexed.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 of the U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED

The United States Court of Appeals for the Second Circuit merely dismissed the appeal from the judgment of the United States District Court without any opinion and by order dated May 16, 1977 (Appendix A). Accordingly, it is presumed that the said Court of Appeals adopted and affirmed the opinion of District Judge Carter dated October 15, 1976, rendered in the Southern District of New York (Appendix B). Petitioner respectfully contends that the conclusions reached in the judgment of the lower court are erroneous, and the questions presented herein contain the very same reasons underlying the petition for the issuance of the writ herein. They are as follows:

1. Whether the petitioner's complaint in this action was erroneously dismissed on the basis of the doctrine of *res judicata.*

2. Whether the petitioner has been denied his due process right to hear and examine the tape recording of the hearing held before the Magistrate in the Eastern District of New York on January 7, 1974.

3. Whether the petitioner's *pro se* complaint should

have been liberally construed and not held to the technical rules of pleadings.

4. Whether the petitioner has a right, pursuant to the Freedom of Information Act, to examine records and documents pertaining to his case which are in the custody of the National Labor Relations Board.

STATEMENT OF THE CASE

Petitioner originally *pro se* instituted this action in 1975 in the United States District Court for the Southern District of New York. Basically, the action was instituted for the main purpose of obtaining access to and production of certain records from the respondents.

The District Court dismissed this action by an order and opinion of the Hon. Robert L. Carter, United States District Judge, dated October 15, 1976, (Appendix B)

An appeal was then taken to the United States Court of Appeals for the Second Circuit. After some misunderstanding about a stipulation discontinuing the appeal, the same was dismissed by that Court by order, without any opinion, dated May 16, 1977. (Appendix A)

The instant case is the third in a series of related but different cases brought by the petitioner herein in the federal district courts. This series of lawsuits arose out of the fact that petitioner was terminated from his employment with respondent, Argo Instruments Corp. Following his termination of employment, petitioner filed complaints with the National Labor Relations Board, and with state and federal anti-discrimination agencies, without successful results.

Petitioner then instituted an action in the Eastern District of New York, on July 13, 1972, against his former employer, and against his union representative (72 Civ. 930). He sought reinstatement with back pay plus additional monetary damages.

The said case was referred to the Hon. Vincent A. Catoggio, United States Magistrate, for a hearing and report. A hearing was held, and subsequently the district court dismissed the said complaint by order of the Hon. Edward R. Neaher, United States District Judge, dated May 9, 1974.

Petitioner subsequently instituted a second action in the Eastern District of New York, on May 9, 1974 (74 Civ. 725). Said action was brought against Magistrate Catoggio and against Court Reporter, Ann Raftrey, as defendants. In said action, petitioner as plaintiff alleged that the transcript of the hearing which had been held before Magistrate Catoggio on January 7, 1974, had been altered. In his claim for relief, petitioner sought to strike from the record said altered minutes, and to remove said defendants from their respective offices.

The hearing of January 7, 1974 had been recorded by two different methods. Miss Raftrey took stenographic notes and then prepared a typewritten transcript thereof, and at the same time, a tape recording was made of the testimony.

In his opinion dismissing the complaint in that action, District Judge Neaher stated that he compared the tape recording with the typed transcript and found petitioner's claim that said transcript had been altered to be without merit. However, petitioner, at that time, was denied the opportunity to personally hear the said tape recording, despite his requests to that effect. As a result, the district court, by the Hon. Edward R. Neaher, dismissed the complaint in said action, by order dated May 28, 1974, annexed hereto as Appendix C.

The instant action was instituted in the District Court for the Southern District of New York, on August 29, 1975, (74 Civ. 4296). Specifically, the petitioner seeks access to certain records and documents, as follows:

(a) Records and documents in the possession of the National Labor Relations Board, concerning the petitioner.

(b) Records and documents in the possession of the New York City Police Department, concerning the petitioner.

(c) Records and documents in the possession of petitioner's former employer, Argo Instruments Corp., concerning the petitioner.

(d) The tape recording of the hearing held before Magistrate Catoggio on January 7, 1974, in which petitioner testified.

In view of the fact that the earlier cases were dismissed, there does not appear to be any proper federal jurisdiction over the records and documents in the possession of either respondent, New York City Police Department or of respondent, Argo Instruments Corp. Therefore, this action against the New York City Police Department and Argo Instruments Corp. is not being appealed to this Court. Accordingly, the balance of this petition will be devoted only to an examination of petitioner's request for access to records and documents in the possession of the respondent, National Labor Relations Board, and for access to the tape recording of the hearing held before Magistrate Catoggio in the Eastern District Court on January 7, 1974.

REASONS FOR GRANTING THE WRIT

I

THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT IN THIS ACTION ON THE BASIS OF THE DOCTRINE OF RES JUDICATA WAS ERRONEOUS.

The District Court for the Southern District of New York, in its opinion dismissing the instant action, incorrectly invoked the doctrine of *Res Judicata.* The opinion of Judge Carter (Appendix B) wrongfully asserted that the petitioner's claims in this case had already been litigated before Judge Neaher in the Eastern District of New York, and had previously been determined by him. The United States Court of Appeals for the Second Circuit obviously agreed with Judge Carter by dismissing the appeal by order (Appendix A) and without opinion.

By relying primarily on the doctrine of *Res Judicata,* the Courts below were incorrect and committed serious and prejudicial error. Petitioner's initial action in the Eastern District of New York (72 Civ. 930) did not seek production of documents and records from the N.L.R.B. In fact, the N.L.R.B. was not even a party to said original action. In that action, petitioner sued his union and former employer, seeking reinstatement, back pay and money damages.

The present action (75 Civ. 4296) seeks records in the possession of the N.L.R.B., pursuant to the Freedom of Information Act (Title 5 U.S.C. 551 et seq.). Said Act of Congress has been held to expand the right of the public to access to information in the possession of agencies of the federal government. All of the case law on the subject affirms that the disclosure provisions of the Freedom of Information Act are to be liberally read and construed, and that the Courts should restrain the use of broad judicial discretion to block disclosure.

This Court, in a recent case, *Department of Air Force v. Rose,* 96 S. Ct. 1592 (1976), affirming 495 F. 2d 261 (2d Cir. - 1974), held that Congress in enacting the Freedom of Information Act structured a revision whose stated purpose reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." The congressional objective was to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny and inspection.

A portion of the present action is based primarily upon a request by petitioner to the respondent, N.L.R.B., for information, by letter dated April 26, 1975. The N.L.R.B. denied petitioner's request in a letter from the office of its general counsel, dated July 29, 1975 annexed hereto as Appendix D. Thus, the instant action constitutes, in part, a request for judicial review of the N.L.R.B's determination of July 29, 1975. Such judicial review is clearly authorized by Title 5 U.S.C. 552 (a) (4) (b) and (c).

Since both of the earlier cases in the Eastern District of New York had already been dismissed by Judge Neaher prior to the N.L.R.B.L's determination of July 29, 1975, it is self-evident that said determination could not have been reviewed by the Eastern District Court. Furthermore, neither of Judge Neaher's opinions address the question of access to N.L.R.B. records.

Similarly, the other portion of the instant case, namely, the issue of petitioner's access to the tape recording of the District Court hearing held before Hon. Vincent A. Catoggio, United States Magistrate, Eastern District of New York, on January 7, 1974, was never judicially determined in the two Eastern District cases. The first proceeding (72 Civ. 930), had no connection whatsoever to the question of the tape, nor did the Court's opinion in that case refer to said tape recording.

In the second action (74 Civ. 725), petitioner herein sought two different types of relief. He sought to strike

from the record a transcript which he alleged had been altered, and he sought to remove certain persons (*i.e.* the Magistrate and the Court Reporter) from public office. Judge Neaher dealt only with both of those questions in his opinion and order of May 28, 1974 (Appendix C).

However, in the instant case, the petitioner raises a completely new question and issue, *i.e.* the question and issue of his right to said tape (or the transcript of said tape) of the hearing held before Magistrate Vincent A. Catoggio. Thus, in the instant case, petitioner is not seeking to correct a transcript or to remove certain officials from public office; he is merely seeking information pertaining to his case. This is an entirely separate and different question and issue, which was not litigated or resolved in the two prior proceedings.

Therefore, the reliance of Judge Carter on the doctrine of *Res Judicata* was completely misplaced. Similarly, the affirmance by the Second Circuit of said erroneous opinion warrants the consideration and review by this Honorable Court.

II

PETITIONER HAS BEEN DENIED HIS DUE PROCESS RIGHT TO HEAR AND EXAMINE THE TAPE RECORDING OF THE HEARING HELD BEFORE THE MAGISTRATE IN THE EASTERN DISTRICT OF NEW YORK ON JANUARY 7, 1974.

As heretofore stated, during the litigation of the first Eastern District case (72 Civ. 930), a hearing was held before Magistrate Vincent A. Catoggio, on January 7, 1974. This hearing was admittedly recorded by two different methods; stenographic notes and a tape recording.

The stenographic notes have been transcribed and are part of the court record in that case. Petitioner claims that said stenographic transcript is inaccurate and incomplete, and seeks to examine the tape recording. Serious efforts have been made by the petitioner to examine said tape recording, all to no avail.

It should be particularly noted that at one point, the petitioner herein moved in his previous case to strike down the finding or report made by Magistrate Vincent A. Catoggio on the ground that the sworn testimony of the petitioner had been altered. Thereafter, District Judge Neaher issued a memorandum order dated May 28, 1974 (Appendix C), in which he states among other things, as follows:

> " . . . the court has previously ruled adversely to plaintiff on his claim that the minutes were altered. *Nachbaur v. Dellheim* 72 C 930, Memorandum Order of May 10, 1974, dismissing the action. While the court is inclined to view that ruling as dispositive of the claim here, *we have nevertheless compared the recorded tapes of the hearing with the minutes and find petitioner's alteration claim to be wholly without merit.*" (Italics ours)

Thereupon, after still having failed to see or obtain a copy of said tape recording, the petitioner instituted the instant action, which was dismissed by District Judge Carter. In his opinion of October 15, 1976, Judge Carter stated that court transcripts "are matters of public record and easily obtained without the necessity for court process." Presumably, this statement should apply to tape recordings as well as to written transcripts.

The petitioner herein wholeheartedly agrees with Judge Carter that court transcripts are matters of public record, and should be easily obtainable. However, in the

instant case, the petitioner has been constantly and repeatedly rebuffed and frustrated by the court clerks of the Eastern District of New York, in his serious and sincere efforts to obtain said tape, despite the fact that he was ready, willing and able to pay for it.

In his said opinion, District Judge Carter also based his conclusion to dismiss the action on the ground that Judge Neaher had already examined the said tape recording. Judge Carter stated:

> **"In any event, as will appear more fully, this matter has already been canvassed by Judge Neaher in a prior proceeding."**

It is respectfully submitted and contended that Judge Neaher was definitely mistaken and in error when he stated that he had compared the recorded tape of the hearing before Magistrate Catoggio with the transcribed minutes of said hearing. As absolute proof of this, there is submitted herewith a series of three registered mail letters from the petitioner, dated respectively, May 5, 1977, June 3, 1977 and June 16, 1977, annexed hereto as Appendix E, all addressed to Mr. Robert G. Johnson, Law Clerk to Judge Neaher. Said letters specifically request, time and again, the tape transcript of the two and one-half hour hearing before Magistrate Catoggio, which was never furnished to petitioner, although allegedly examined by Judge Neaher. However, on June 20, 1977, said Mr. Robert G. Johnson, Law Clerk to Judge Neaher finally sends a letter annexed hereto as Appendix F to petitioner explaining why the tape recording of the two and one-half hour session was never furnished to petitioner. He stated as follows:

> **"The explanation is simple. No one in the Magistrate's office, Judge Neaher's chambers, or the Clerk's office has been able to find such a tape. On May 5, I played for you the only tape that we have of one of your hearings.**

> **Extensive efforts to find the January 7, 1974 tape have been unavailing."**

Accordingly, Judge Carter's opinion which is based in the main on Judge Neaher's inspection and comparison of the tape recording of the hearing of January 7, 1974 is unsupported in view of the aforesaid letter of June 20, 1977 (Appendix "F"), which admits that said tape is not locatable. The main premise of the District Court determination herein falls and the affirmance order by the Second Circuit of that erroneous opinion must also be reversed.

For the sake of completeness, this Court should be advised that the petitioner herein retained an attorney, Eugene Prosnitz, Esq. to take and prosecute an appeal from the aforesaid determination and opinion of District Judge Carter (Appendix B) to the United States Court of Appeals for the Second Circuit. At that time, the petitioner made it absolutely clear to his said attorney, Eugene F. Prosnitz, Esq., that the main target of his appeal was to be the respondent, United States District Court for the Eastern District of New York, from whom he was seeking the tape recording of the two and one-half hours of sworn testimony before Magistrate Catoggio, which had definitely been altered.

That without the knowledge or consent of the petitioner herein, his said attorney, Eugene F. Prosnitz, Esq., entered into a stipulation with Peter C. Salerno, Esq., Assistant United States Attorney for the Southern District of New York, dated April 8, 1977, withdrawing the petitioner's appeal as to the respondent, United States District Court for the Eastern District of New York, annexed hereto as Appendix G. The said stipulation dismissing the appeal was filed with the United States Court of Appeals for the Second Circuit on April 12, 1977. The petitioner was not served with or given a copy of said

stipulation until some four weeks after it was filed, namely on May 10, 1977.

The petitioner thereupon *pro se* filed with the United States Court of Appeals for the Second Circuit. one captioned motion for discovery and the other a motion to reinstate the appeal. Said motions were never determined in view of the dismissal of the petitioner's appeal by order of May 16, 1977 (Appendix A). The fact remains that the petitioner never agreed or consented to a dismissal of his own appeal nor did he ever authorize his attorney to do so.

Obviously, the reason for his then attorney, Eugene F. Prosnitz, Edq., doing so was because he was promised and assured by the Assistant United States Attorney, Peter C. Salerno, Esq. that the tape recording in question would be made available to the petitioner. However, as heretofore pointed out, the said tape recording was never made available to petitioner (Appendix F). Since Judge Neaher, in his memorandum order of May 28, 1974, states that the tape recording was compared with the minutes of the hearing lasting two and a half hours and found no alteration, it is indeed strange, peculiar and unjust that the said tape recording should not now be produced for the petitioner.

From all of the above, it is quite clear that the petitioner has a due process right to hear and examine the tape recording of the hearing held before Magistrate Catoggio in the Eastern District Court of New York on January 7, 1974. Having wilfully and deliberately failed to produce said tape recording constitutes a clear deprivation of due process, which requires no authority other than the uncontradicted facts set forth above.

As a matter of due process, a litigant should be afforded access to all materials which may be relevant to his case. In *Sigafus v. Brown*, 416 F. 2d 105 (7th Cir. - 1969), which also dealt with a *pro se* complaint, the Court held that deprivation of materials necessary to afford reasonable

access to the courts, violates the due process clause of the Fourteenth Amendment and a federal court has jurisdiction of such claim for damages based n such deprivation. In *Sigafus*, the materials in question were legal papers in the possession of the deputy sheriff. See: *Johnson v. Avery*, 393 U.S. 483, 485, 498 (1969) and *DeWitt v. Parl*, 366 F. 2d 582 (9th Cir. - 1968).

It is well settled law that litigants have a due process right to be granted access to adverse evidence. including adverse governmental recommendations and reports, so that they may have the opportunity to rebut said evidence, or said factual findings. See: *United States v. Gonzales*, 348 U.S. 407 (1955); *United States v. Simmons*, 348 U.S. 397 (1955); *United States v. Purvis*, 403 F. 2d. 555 (2nd Cir. - 1968).

While the above cases were criminal cases, the issue of access to government reports arose in a civil context; *i.e.* the issue of whether there was a basis in fact to support the government's denial of conscientious objector status to the individual litigant. The result would have been the same if these cases had been civil proceedings, e.g. habeas corpus proceedings seeking discharges from military service.

In the instant case, petitioner seeks access to a tape recording of a hearing before Magistrate Catoggio, which was held in a previous case. Petitioner does not wish to accept Judge Neaher's analysis of the contents of said tape; he prefers to hear the tapes for himself. This is no reflection on Judge Neaher or the Eastern District Court of New York. It is certainly possible that petitioner, who has been willing to devote considerable time, energy and money to this litigation, would study the tape more thoroughly and accurately. The petitioner might very well perceive and discover certain items of evidence, certain nuances and certain alterations which Judge Neaher might have overlooked.

In *Alderman v. United States*, 394 U.S. 165 (1967), this Court held that transcripts of electronic surveillance

must be turned over to the defendant and that it is not sufficient for the trial judge to read said transcripts in camera. The in camera procedure has generally been reserved for cases involving informers or other persons whose confidentiality must be protected. Such factors do not apply in the instant case. There are no confidential relationships which would be affected by a release of the said tape to the petitioner herein.

The effective administration of justice is best served by increasing and maximizing public confidence in our judicial system. One method by which this can be achieved is by permitting broad access to the materials of litigation. If a litigant wishes to examine these materials for himself, rather than relying upon a judge's examination of said materials, he should be permitted to do so. This will help restore public confidence by showing that the courts have nothing to hide.

III

PETITIONER'S PRO SE COMPLAINT HEREIN SHOULD HAVE BEEN LIBERALLY CONSTRUED AND NOT HELD TO THE TECHNICAL RULES OF PLEADING.

As heretofore stated, the petitioner instituted this suit under the Freedom of Information Act. Respondents, in the Courts below, have pointed out that the said Act does not apply to courts but only to federal agencies. However, it is contended that such is not a proper ground for dismissal of the complaint. As pointed out in Point II of this petition the petitioner would be entitled to the relief he seeks as a matter of constitutional due process, apart from the Freedom of Information Act.

The mere fact that the petitioner's *pro se* complaint, annexed hereto as Appendix H, may have stated the wrong

legal theory does not bar him from relief. It is not necessary to set forth the particular legal theory under which recovery is sought in order to have a valid cause of action.

In *Misco Leasing Co. v. Keller*, 490 F. 2d 545, 548 (10th Cir.-1974), Circuit Judge Pickett succinctly stated:

> "The dimensions of a suit are not determined by the pleadings, *Dearman v. Woodson*, 429 F. 2d 1288 (10 Cir. 1970), and it is not necessary to allege the particular law or theory under which recovery is sought. *United States v. Missouri-Kansas-Texas Ry. Co.*, 273 F. 2d 474 (10 Circ. 1960)."

See: Fed. Rules Civ. Pro., Title 28, U.S.C.A. Rule 8 (a).

Furthermore, complaints drafted by *pro se* litigants must be liberally construed, and should be held to less stringent standards than pleadings drafted by attorneys. This principle was well-enunciated in *Merckens v. F. I. DuPont*, 514 F. 2d 20 (2nd Cir. - 1975):

> "We do not reach the question of the nature of the offense charged in the complaint, although we do note that a complaint drafted by a *pro se* litigant must be liberally construed in view of his lack of professional sophistication. See *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam)."

See: *John v. Hurt*, 489 F. 2d 786 (7th Cir.-1973).

If petitioner had, in fact, stated the wrong legal theory in his complaint, the proper remedy should have been to allow him to amend his complaint—not dismissal thereof. Since petitioner is seeking a tape recording which is, presumably, in the possession of a clerk or court officer of the Eastern District Court of New York, a mandamus action directed to said Court would probably have been the most appropriate procedural vehicle.

The respondents also contend that the petitioner has sued in the wrong district. However, the appropriate remedy would not be a dismissal of the petitioner's action, but would properly be an order granting a change of venue, pursuant to the provisions of Title 28 U.S.C. 1404a. In a case where venue is defective, such case may be transferred to the proper judicial district. *Junior Spices, Inc. v. Turbotville Press, Inc.*, 339 F. Supp. 1189 (E.D. Penn. - 1972).

IV

PETITIONER HAS A RIGHT PURSUANT TO THE FREEDOM OF INFORMATION ACT, TO EXAMINE RECORDS AND DOCUMENTS PERTAINING TO HIS CASE WHICH ARE IN THE CUSTODY OF THE NATIONAL LABOR RELATIONS BOARD.

As heretofore stated, petitioner, in his complaint, seeks the release of documents and records in the possession of the N.L.R.B., pertaining to the complaint which he originally filed with the N.L.R.B. In its letter from the Office of the General Counsel dated July 29, 1975 (Appendix D), the N.L.R.B. cited certain exceptions to the Freedom of Information Act, *i.e.* Title 5 U.S.C. 552(b) (5), (7A), (7C) and (7D), as the justification for denying petitioner the information and records which he seeks.

In the leading case, *Rose v. Dept. of the Air Force*, 495 F. 2d 261 (2nd Cir. - 1974), affd., 96 S. Ct. 1592 (1976), this Court held that the purpose of the Freedom of Information Act was to pierce the veil of administrative secrecy and to open agency action to public scrutiny. This Court further held that exceptions to the Act must be narrowly construed, and should be allowed only in cases where denial of information may be necessary to prevent an invasion of personal privacy, or when the release of the information will cause serious harm to certain individuals.

The cases cited in the N.L.R.B. letter determination (Appendix D) are, for the most part, cases in which employers were denied information in the files because the information in question had been gathered from employees who might face retaliation if the employer learned that said employees had furnished said information to the N.L.R.B. Clearly, this has no applicability to the instant case, where petitioner is a former employee who is in no position to retaliate against his former employer or co-workers.

It is well established that a litigant may have an even greater right of access to records than that afforded to a third party under the Freedom of Information Act. See: *United States v. Weinstein*, 511 F. 2d, 622 (2nd Cir. - 1975).

In any event, Title 5 U.S.C. 552 (a) (4) (B) of the Freedom of Information Act places the burden squarely upon the governmental agency to sustain its denial of information or records. This has not been done in the instant case. The Southern District Court (Carter, J.) dismissed this case (Appendix B) without ever reaching the merits of the N.L.R.B.'s determination of July 29, 1975 (Appendix D). The Second Circuit Court of Appeals issued an order affirming said dismissal (Appendix A) without even giving any reason or writing any opinion in connection therewith. The mere fact that the petitioner appeared *pro se* did not in itself warrant such summary disposal of his lawsuit.

In view of all of the above, it becomes eminently clear that the petitioner herein was denied his right of due process.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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New York, N.Y. 10022

APPENDIX "A"
ORDER DATED MAY 16, 1977

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of May, one thousand nine hundred and seventy-seven.

Present:
HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH
HON. MURRAY I. GURFEIN Circuit Judges.

Edwin Nachbaur,

Plaintiff-Appellant

v.

National Labor Relations Board, Police Department, City of New York, Walter Dellheim, Argo Instruments Corp., and United States District Court, Eastern District of New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was taken on submission

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the appeal from a judgment of said District Court be and it hereby is dismissed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk
by s/Arthur Heller
Arthur Heller
Deputy Clerk

76-6172

APPENDIX "B"
OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWIN NACHBAUR,

Plaintiff Pro Se,

-against-

NATIONAL LABOR RELATIONS BOARD, POLICE DEPARTMENT, CITY OF NEW YORK, WALTER DELLHEIM, ARGO INSTRUMENTS CORP., UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK,

Defendants.

APPEARANCES:

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of New York and Hon. Edward R. Neaher

75 Civ. 4296

45258

OPINION

Plaintiff's motion for the appointment of counsel is hereby denied and his complaint is hereby dismissed for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), F.R.Civ. P., and on the further ground that the instant motion is barred by the doctrine of *res judicata.* Plaintiff's motion to amend his complaint to seek money damages from the defendants is denied for the same reasons.

Plaintiff's action, apparently based on the Freedom of Information Act, 5 U.S.C. §552, seeks the production of a variety of documents. It is clear that this court has no jurisdiction under that statute to order the production of documents from the New York City Police Department or from private corporations and individuals. Furthermore, the production sought by the plaintiff from Judge Edward R. Neaher, United States District Judge for the Eastern District of New York and/or from Magistrate Vincent A. Catoggio, United States Magistrate, Eastern District of New York, requires no court order since the court transcripts, to the extent that they exist, are matters of public record and easily obtained without the necessity for court process. In any event, as will appear more fully, this matter has already been canvassed by Judge Neaher in a prior proceeding.

The only item in plaintiff's complaint which is properly before this court is what plaintiff refers to as "documents and/or other information submitted by the general counsel, Regional Office of NLRB and/or other person(s) [of] NLRB, to establish basis of administrative ruling to uphold my dismissal from employment."

It is clear to me that plaintiff's complaint must be dismissed with respect to this matter as well. The discovery sought here has already been sought in connection with a

prior action brought by the plaintiff in the Eastern District of New York before Judge Neaher, captioned "EDWIN NACHBAUR v. WALTER DELLHEIM, et al., 72 C 930."

On September 24, 1973, Judge Neaher referred this action to the Honorable Vincent A. Catoggio, United States Magistrate to conduct pretrial proceedings and to serve as special master for purposes of a hearing. The Magistrate fully canvassed the issues before him—including the discovery sought by the plaintiff which encompassed the same items of discovery sought here. In a 12-page report issued February 11, 1974, the Magistrate, acting as special master, recommended that the plaintiff's complaint be dismissed. He further found as follows:

> "5. From the names of the persons on whom the plaintiff caused subpoenas to be served coupled with the plaintiff's own testimony and papers on file in this Court, to require these prospective witnesses to appear in Court and to be subjected to interrogation by the plaintiff would be a useless, undesirable and highly unjust abuse of the judicial processes."

On May 9, 1974, Judge Neaher issued an order adopting the report of the Magistrate in all respects and dismissing the plaintiff's action.

Finally, on May 28, 1974, Judge Neaher dismissed a new complaint filed by Mr. Nachbaur against the United States Magistrate and the Court Reporter present at the hearing in plaintiff's earlier action in the Eastern District. That complaint sought to set aside or strike from the record the "altered minutes" of that hearing. Judge Neaher noted that he had compared the recorded tapes of the hearing with the minutes and found petitioner's claim of alteration to be "wholly without merit."

In sum, it appears that all matters raised in the instant complaint have been fully reviewed in the two prior proceedings before Judge Neaher. Plaintiff's motion to

amend the complaint to recover money damages from the defendants does not change this.

Accordingly, plaintiff's complaint is dismissed.

IT IS SO ORDERED.

Dated: New York, New York
October 15, 1976

s/Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

APPENDIX "C"
MEMORANDUM ORDER

UNITED STATES DISTRICT IOURT
EASTERN DISTRICT OF NEW YORK

EDWIN NACHBAUR,

Plaintiff,

-against-

VINCENT A. CATOGGIO, ANN RAFTREY,

Defendants.

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74 C 725

MEMORANDUM ORDER

Plaintiff *pro se* has filed a complaint in this court against the United States Magistrate and court reporter who conducted a hearing in plaintiff's earlier-filed action in this court, *Nachbaur v. Dellheim*, 72 C 4296. At present Nacubaur seeks (1) a setting aside, or striking from the record, the "altered minutes" of a hearing before the defendant United States Magistrate Vincent A. Catoggio, on January 7, 1974, in the case of *Nachbaur v. Dellheim*, 72 C 930; and (2) the removal of both defendants from public office.

With respect to (1), the court has previously ruled adversely to plaintiff on his claim that the minutes were altered. *Nachbaur v. Dellheim*, 72 C 930, Memorandum Order of May 10, 1974, dismissing the action. While the

court is inclined to view that ruling as dispositive of the claim here, we have nevertheless compared the recorded tapes of the hearing with the minutes and find petitioner's alteration claim to be wholly without merit.

With respect to (2), to the extent it is predicated upon or ancillary to (1), it is likewise without merit. To the extent it may be predicated upon any other consideration, this court has no jurisdiction over a civil action seeking such relief.

Accordingly, to the extent this complaint relates to the court's action in *Nachbaur v. Dellheim*, 72 C 930, it is treated as an application, under Rule 60, F.R. Civ. P., for relief from the final order in that case, and is hereby denied. To the extent this complaint seeks new relief, the action is dismissed for want of jurisdiction. Rule 12(h)(3), F.R. Civ. P.

So ordered.

s/Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, N.Y.
May 28, 1974

74 C 725

APPENDIX "D"
LETTER FROM NATIONAL LABOR RELATIONS BOARD

July 29, 1975

Re: Argo Instruments Corp.
Case No. 29-CA-2044

Mr. Edwin Nachbaur
48 West 89th Street
New York, New York 10024

Dear Mr. Nachbaur:

Your appeal from the Regional Director's refusal to furnish information requested in your letter of April 26, 1975, has been duly considered.

The appeal is denied. Without regard to the applicability of exemption 4 of the Freedom of Information Act, 5 U.S.C. Section 522(b)(4), (hereinafter the "FOIA"), the documents requested are privileged from disclosure under exemptions 5 and 7(A), (C) and (D) of the FOIA, 5 U.S.C. Section 522(b)(5), (7(A)), (7(C)) and (7(D)).

Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the investigation of unfair labor practice cases much information, including statements, is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identity of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring

the Agency's continuing ability to obtain such relevant information. Individuals giving statements in the investigation are given express assurances that sworn statements will not be disclosed unless and until the individual is called as a witness in a formal proceeding, as provided for is Section 102.118(b) of the Board's Rules and Regulations. If the Agency were forced to disclose statements submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation of witnesses, hinder obtaining sworn information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 540 (D.C. Ga.) affmd., *N.L.R.B. v. Clement Brothers Co.*, 407 F.2d 1027 (C.A. 5); *Wellman Industries, Inc. v. N.L..B.*, 490 F.2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. *.L.R.B. v. Scrivener*, 405 U.S. 117; *N.L.R.B. v. Golden Age Beverage Co.*, 415 F.2d 26 (C.A. 5).

Also, since these statements contain matter personal to the individual supplying the statement and to individuals referred to in the statements, they are exempt from disclosure under exemption 7(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party in disclosure. You have submitted no considerations which would overcome the privacy rights of individuals and, therefore, their right of privacy must prevail.

The requested statements are also within exemption 7(D) because their disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or

in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the Agency during the investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this Agency. Accordingly, since the individuals furnishing statements in the instant case are confidential sources, exemption 7(D) authorizes our refusal to identify the witnesses.

The investigatory files also include documents containing selective findings of fact and the recommendations of the Board Agent which constitute intra-agency memoranda reflecting the Agency's deliberative and consultative process. As such, these documents comprise part of the attorney's work product and are privileged from disclosure under exemption 5. See *N.L.R.B. v. Sears Roebuck & Co.*, 95 S. Ct. 1504 (1975) and *Renegotiation Board v. Grumman Aircraft Engineering Corporation*, 95 S. Ct. 1491 (1975). And, to the extent such documents identify individuals giving statements and reveal the contents of their statements, they are further privileged from disclosure under exemption 7(A), (C) and (D) for the reasons set forth above.

The undersigned, Robert E. Allen, at the direction of, and pursuant to the policies established by, General Counsel Peter G. Nash, is responsible for the determination that the records you requested are privileged from disclosure under the Freedom of Information Act.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his place of business, or in which the records are situated, or in

the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

Peter G. Nash
General Counsel

By s/Robert E. Allen
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 29

APPENDIX "E"
VARIOUS LETTERS

48 West 89th Street
New York, New York 10024
May 5, 1977

The Law Clerk of Judge Neaher
Office of Judge Neaher
U.S. District Court, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, New York

Dear Sirs:

This is in reference to the tape you have been playing for me this afternoon, and/or the tapes my lawyer has been requesting. Because of the rather poor quality and high-pitched sounds your machine reproduced, I transfered my duplicate to an open-reel machine. By using different speeds for record and playback, I obtained a much improved and very audible copy of your tape, which appears to cover a time slot of less than (20) minutes. My lawyer specifically requested the tapes of the January 14, 1974 hearing of more than 2 hours and 30 minutes of sworn testimony, to which Judge Neaher refers to in his Order/Memorandum of May 28, 1974, case 74C725, in which he is very specific about said tapes and says, among other things: "While the court is inclined to . . . , *we have nevertheless compared the recorded tapes of the hearing with the minutes and find petitioner's alteration claim to be wholly without merit.*"

Please do inform me in writing, and as soon as conveniently possible, why this afternoon you did not and/or the court did not produce requested tapes.

Respectfully yours,

s/Edwin Nachbaur
EDWIN NACHBAUR

REGISTERED MAIL
(return receipt requested)

cc: Dr. Eugene F. Prosnitz, Esq.
Judge Neaher

48 West 89th Street
New York, New York 10024
June 3, 1977

Mr. Johnson, Law Clerk of Judge Neaher
Office of Judge Neaher
U.A. District Court, Eastern District N.Y.
Court House
225 Cadman Plaza East, Brooklyn, N.Y.

Dear Mr. Johnson,

This is to renew my request of May 5, 1977, of explaining to me in writing, why at the said May 5 you did not produce the sought tapes of more than 2½ hours of sworn testimony which I gave before Magistrate Catoggio on January 7, 1974, and which has been definitely altered. I also would like you to tell me why the timing for listening of the said sought tapes on May 5 was set for 3 p.m., where the courts usually close before 5 p.m., and where it takes more than 2½ hours of time to play back and listen to tape recordings of more than 2½ hours of sworn testimony which has been altered.

Peter Salerno, in a sworn affidavit of May 13, 1977, filed with the Court of Appeals, alleges that you agreed to produce the sought tapes of said more than 2½ hours of sworn testimony, which has been altered. He also says that you be vacationing in St. Louis, Missouri, and expected back before May 17. Well, I hope you had a good time, and are back and have again adjusted to your work as law clerk to judge Neaher, because I have one further request: I wish to make a xerox copy of the file card, which you on May 5 produced and read to us, when we on the way down to the main floor shortly stepped into Catoggio's office. As you will recall, on the said card it mentioned transcript of 2½ hours of sworn testimony which I gave before Catoggio on January 7, 1974, without indicating the existing tapes. I

shall be very grateful for your arranging a date and time where I can come down to your office and/or Catoggio's office for making said xerox copy of file card. And please do give me as soon as conveniently possible a written explanation as to why you did not produce on May 5 the sought tape recordings of more than 2½ hours of sworn testimony.

Very respectfully yours,

s/Edwin Nachbaur
EDWIN NACHBAUR

REGISTERED MAIL
(Return receipt requested)

cc
Eduard R. Neaher, Judge

REGISTERED MAIL
(return receipt requested)

48 West 89th Street
New York, New York 10024
June 16, 1977

Mr. Robert Johnson
Law Clerk of Judge Neaher
U.S. District Court, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, New York

Ref.: Your telephone call of today to Professional Camera requesting that I return call at 330-7571.

Issue: Explanation as to why you on May 5, 1977 did not produce the sought tape recordings of more than 2½ hours of sworn testimony.

Dear Mr. Johnson:

This is to renew my requests of May 5 and June 3, respectively, of explaining to me in writing as to why you on said May 5 did not produce the sought tape recordings of more than 2½ hours of sworn testimony, which has been definitively altered. And why was the timing set for 3 p.m., where the court usually closes before 5 p.m., and where it takes much more than 2½ hours to play back, listen and record more than 2½ hours of sworn testimony which has been altered. The United States District Attorney's office filed with the Court of Appeals a sworn affidavit, dated May 13, 1977, stating among other things that you agreed to produce the sought tapes of more than 2½ hours of sworn testimony, which I gave before, have definitively been altered! Yet, you did not produce them. Why?

I further request that I may come down to your office for making a xerox copy of the file card, which you on May 5 produced and read to us, me and Dr. Prosnitz, when we shortly stepped into Catoggio's office. As you will recall, on the said file card was entered transcript of 2½ hours of

sworn testimony (the actual time was more), which I gave before Catoggio on January 7, 1974, but no record is made of the existing tape recordings on the said file card, which you showed and read to us. This said file card, as you will understand, is a new element and may be of great importance in resolving the matter in dispute.

Please be so kind and do give me as soon as conveniently possible a written explanation as to why you did not produce the sought tape recordings of more than 2½ hours of sworn testimony, and please be so good and do arrange a date and time when I can come down for copying the said file card. I shall appreciate very much your doing so.

Respectfully yours,

s/Edwin Nachbaur
EDWIN NACHBAUR

Registered mail
(return receipt requested)
Eduard Neaher, Judge
Registered Mail
A Daniel Fusaro, Clerk,
Court of Appeals, Secont Crct
Registered Mail

APPENDIX "F"
LETTER FROM U.S. DISTRICT COURT

June 20, 1977

Mr. Edwin Nachbaur
48 West 89th Street
New York, N.Y. 10024

Dear Mr. Nachbaur:

This is in response to your letter of JUne 16, 1977, requesting an explanation as to why I did not produce for you a tape recording of 2½ hours of testimony given before Magistrate Catoggio on January 7, 1974.

The explanation is simple. No one in the Magistrate's office, Judge Naher's chambers, or the Clerk's office has been able to find such a tape. On May 5 I played for you the only tape that we have of one of your hearings. Extensive efforts to find the January 7, 1974 tape have been unavailing.

I attempted to respond to your May 5 letter by telling your attorney, Mr. Prosnitz, on the telephone that we did not have the tape you want. Perhaps that message did not reach you because you ended your relationship with Mr. Prosnitz about that time. I called you at your office last week simply to tell you that we are still looking for the missing tape. We have ordered the files in your two earliest cases to see if the tape was placed inside one of them by mistake. Since these old files are now stored in New Jersey with other closef iles, it will take a few more days to get them. When these files are checked we will have exhausted every conceivable place the tape might be.

As for your request to xerox the file card kept by the Magistrate's office on your case, you may certainly come in at any time to do so. Either ask the Magistrate's office for

it, or come to Judge Neaher's chambers and I will get it for you. I am here from 9:00 a.m. to 6:00 p.m. Call any day to set up an immediate appointment.

Very truly yours,

s/Robert G. Johnson
ROBERT G. JOHNSON
Law Clerk to Judge Neaher

APPENDIX "G"
STIPULATION DISMISSING APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWIN NACHBAUR,

Plaintiff-Appellant,

-v.-

NATIONAL LABOR RELATIONS BOARD, N.Y.C. POLICE DEPT., WALTER DELLHEIM, ARGO INSTRUMENTS, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Defendants-Appellees.

Docket No. 76-6172

The undersigned hereby stipulate that the above appeal may be withdrawn, as to appellee United States District Court for the Eastern District of New York only, without costs or attorneys fees and with prejudice.

Dated: New York, New York.
April 8, 1977

s/Eugene Prosnitz
EUGENE PROSNITZ
Attorney for Plaintiff-Appellant
50 Court Street
Brooklyn, N.Y. 11201

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant-Appellee
United States District Court
for the Eastern District of New York

By: s/Peter C. Salerno
PETER C. SALERNO
Assistant United States Attorney

April 12, 1977
SO ORDERED

APPENDIX "H"
COMPLAINT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EDWIN NACHBAUR

Plaintiff Pro Se

-v-

NATIONAL LABOR RELATIONS BOARD, POLICE DEPARTMENT CITY OF NEW YORK, WALTER DELLHEIM, ARGO INSTRUMENTS CORP., UNITED STATE, DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Defendants

FIRST: Comes now Edwin Nachbaur, with complaint and prayer before this HOnorable Court. I have been unrightfully deprived of information vital to the clearing of my name and reputation. I have not been allowed to confront my accusers, question their statements, or refute allegations made in reference to my behaviour and actions. I herein pray for the release of such information to me under the provisions as set forth in the Freedom of Information Act, Public Law 93-502; 88 Stat. 1561. I seek no financial remedy.

SECOND: This Court has jurisdiction by virtue that my residency is within the jurisdictional purview of the United States District Court for the Southern District of New York.

THIRD: I am Edwin Nachbaur. I reside at 48 West 89th Street, New York, New York 10024.

FOURTH: Defendants named herein are as follows:

1) National Labor Relations Board
Office of the General Counsel
Washington, D.C. 20570

2) Police Department City of New York
New York, New York

3) Argo Instruments Corporation
Walter Dellheim, General Manager
New York, New York

4) The Honorable Edward R. Neaher
225 Cadman Plaza East
Brooklyn, New York

FIFTH: National Labor Relations Board; Action sought;

a) Release of Documents and/or other information submitted by general counsel, regional office of ALRB and/or other person(s) nor NLRB to establish basis of administrative ruling to uphold my dismissal from employment.

Police Department City of New York, action sought:

a) Copy of original statements and/or transcript of oral statements, of interrogation and testimony between complainant and Walter Dellheim pertinent to the police investigation of the locker room incident of complainants defaced clothing in the locker room of Argo Instruments Corporation.

b) Falsified or forged and/or altered version of said transcript as used by Walter Dellheim as false evidence in State Labor Court.

Honorable Edward R. Neaher, action sought:

a) Court tape transcript and true duplication of tape-recorded testimony given before U.S. Mag. Vincent

Catoggio on January 7, 1974 in the United States District Court, Eastern District of New York.

s/Edwin Nachbaur
EDWIN NACHBAUR

Sworn to
August 22, 1975

No. 77-231

Supreme Court, U. S.
FILED
OCT 26 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWIN NACHBAUR, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-231

EDWIN NACHBAUR, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner seeks review of the denial of his request to the Board for disclosure of documents relating to the Board's investigation of petitioner's unfair labor practice charges. This case is the culmination of more than seven years of related administrative and judicial litigation.

1. On January 23, 1970, petitioner filed an unfair labor practice charge (Case No. 29-CA-1906), alleging, *inter alia*, that his employer, Efficient Instruments Corp. and Argo Instruments Corp. ("Argo"), violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(1) and (3), by discharging him for engaging in union activities. Petitioner withdrew the charge so that arbitration could proceed. The arbitration process culminated with a ruling by Mario A. Procopio, staff arbitrator for the New York State Mediation Board,

that petitioner had been discharged for just cause. On June 23, 1970, petitioner filed a second charge (Case No. 29-CA-2044) with the Board, again alleging a violation of Section 8(a)(3) and (1) of the Act. The charge was investigated by the Regional Director, who informed petitioner by letter, dated July 31, 1970, that the charge was without merit and accordingly that a complaint would not be issued.[1]

The General Counsel's Office of Appeals denied petitioner's appeal from the Regional Director's decision. Petitioner's requests for reconsideration also were denied.

Petitioner subsequently instituted a civil action (No. 71-CIV-3131) in the United States District Court for the Southern District of New York, against Irving M. Herman, then Director of the Office of Appeals. This action was dismissed on July 12, 1971.

Thereafter, on July 20, 1971, petitioner filed a *pro se* petition for review in the Second Circuit. The petition again sought review of the refusal to issue a complaint. On the Board's motion, the Second Circuit dismissed petitioner's petition. The court of appeals explained "that the refusal of the General Counsel of the National Labor Relations Board to issue a complaint is not reviewable."

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[1]The letter stated, in pertinent part:

> The investigation fails to establish that you were discharged because of your activities on behalf of Local 3, International Brotherhood of Electrical Workers or for any other discriminatory motive encompassed in your charge. Rather, the investigation tends to establish that you were discharged for insubordination. Moreover, your discharge was the subject of an arbitration hearing. See *Spielberg Mfg. Co.*, 112 NLRB 1080. Nor did the investigation establish that the Company violated the Act in any other manner encompassed in your charge.

This Court denied certiorari, 405 U.S. 931, rehearing denied, 409 U.S. 901, second motion for leave to file petition for rehearing denied, 409 U.S. 1019.

Petitioner then instituted an action (72-CIV-930) in the United States District Court for the Eastern District of New York, naming as defendants Argo and the International Brotherhood of Electrical Workers, Local Union No. 3 and their officers.[2] In connection with that action petitioner sought the full records of the Board relating to his two unfair labor practice charges (Nos. 29-CA-1906 and 29-CA-2044 (see pp. 1-2, *supra*)). Thus, on August 20, 1972, petitioner wrote a letter asking that these records be sent to the district court, and on September 7, 1972, petitioner had a subpoena served on Arthur Goldberg, assistant to the Regional Director of Region 29, where petitioner's unfair labor practice charges had been filed. The subpoena called for Goldberg to appear and "to conform with the request of [petitioner] dated August 20, 1972."

On Goldberg's motion, the subpoena was quashed by Judge Edward R. Neaher on July 17, 1973, since no date for trial or hearing had been fixed. The subpoena was reissued on December 12, 1973, however, after Judge Neaher had appointed John C. Corbett to serve as attorney for petitioner, and after the action had been referred to United States Magistrate Vincent A. Catoggio for conduct of pre-trial matters and as special master for purposes of a hearing. (The subpoena of Goldberg was accompanied by subpoenas of 11 other persons; petitioner

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[2]The complaint alleged violation of 42 U.S.C. 2000e-2(a) and (c), which forbids an employer or labor organization from discriminating against an individual on the basis of race, color, religion, sex or national origin.

also filed notice of two depositions to be taken of officers in Region 29 of the Board.)

The Magistrate issued a report on February 11, 1974, concluding, *inter alia*, that "[i]t clearly appears beyond any hope of successful contradiction that the plaintiff was discharged by Argo Instruments Corporation solely because of his own behavior," and that "[n]one of the defendants * * * was guilty of violating any statute of the United States with respect to the plaintiff during and after his employment by Argo Instruments." In regard to the subpoenas, the Magistrate concluded that "to require these prospective witnesses to appear in Court and to be subjected to interrogation by the plaintiff would be a useless, undesirable and highly unjust abuse of the judicial processes." On May 9, 1974, Judge Neaher issued an order adopting the Magistrate's report and dismissing the action.

On May 28, 1974, Judge Neaher dismissed another complaint filed by petitioner against the Magistrate and the court reporter present at the hearing in Case No. 72-CIV-930. In this new action (74-CIV-725), petitioner had sought the setting aside of the "altered minutes" of the hearing before the Magistrate on January 9, 1974, and the removal of the two defendants from public office. The Second Circuit dismissed petitioner's appeal on April 23, 1975, and this Court denied certiorari, 424 U.S. 926.

2. On April 26, 1975, petitioner wrote a letter to Edward H. Levi, Attorney General of the United States, requesting under the Freedom of Information Act (FOIA) that the Board release "[e]vidence and documents which the General Counsel of the NLRB used as premise for issuing an administrative ruling (Case No. 29-CA-2044) against me * * *." The request was referred to Samuel M. Kaynard, Regional Director of the Board's

Region 29. In a letter dated May 30, 1975, Regional Director Kaynard denied petitioner's request. Petitioner appealed this determination to the General Counsel, who denied the appeal by letter dated July 29, 1975 (Pet. App. D, pp. 10a-13a), on the ground that the documents requested are privileged from disclosure under Exemptions 5 and 7(A), (C) and (D) of the FOIA, 5 U.S.C. (and Supp. V) 552(b)(5) and 552(b)(7)(A), (C) and (D).

Petitioner thereafter filed a complaint in the United States District Court for the Southern District of New York (Pet. App. H, pp. 24a-26a), seeking, *inter alia*, the Board's release of the requested documents.[3]

On October 22, 1976, the district court issued a judgment denying petitioner's motion for appointment of counsel, and dismissing petitioner's complaint as to all the defendants on the ground that it failed to state a claim upon which relief can be granted, "and on the further ground that the instant motion is barred by the doctrine of *res judicata*" (Pet. App. B, p. 5a).[4]

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[3]Petitioner also sought documents in the possession of the New York City Police Department; his former employer, Argo Instruments; and Magistrate Catoggio of the United States District Court for the Eastern District of New York (Pet. 5).

The General Counsel of the Board did not receive a copy of the summons by mail until May 25, 1976. On June 25, 1976, petitioner filed a notice of motion for an order to amend the complaint to seek the additional relief of money damages.

[4]The district court stated that the relief sought from the Board was "[t]he only item in plaintiff's complaint which is properly before this court" (*ibid.*), and held that "[i]t is clear to me that plaintiff's complaint must be dismissed with respect to this matter * * *" (*ibid.*). The district court reasoned that "[t]he discovery sought here has already been sought in connection with a prior action brought by the plaintiff in the Eastern District of New York before Judge Neaher * * *" (*id.* at 5a-6a), and that "it appears that all matters raised in the instant complaint have been fully reviewed in the two prior proceedings before Judge Neaher" (*id.* at 6a).

Petitioner appealed to the Second Circuit and requested, *inter alia*, that the matter be remanded to the district court for consideration of petitioner's FOIA claims. Although the Board concurred in petitioner's request for remand, the court of appeals dismissed petitioner's appeal without opinion (Pet. App. A, pp. 1a-2a).

3. The only question presented in this case is whether the court of appeals erred in dismissing petitioner's appeal, apparently without considering the case on the merits.[5] That question, involving only a particular exercise of the court's discretion[6] in the peculiar circumstances of this case, does not warrant review by this Court. The facts set out above show that the court of appeals was amply justified in finally bringing to a close petitioner's litigation concerning his discharge.

In any event, had the court of appeals considered petitioner's claims on the merits, it seems plain it would have affirmed the district court's dismissal of the action on the ground that the requested materials were exempt from mandatory disclosure under the FOIA. As the

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[5]Contrary to petitioner's assumption (Pet. 2, 6), the fact that the court of appeals dismissed the appeal without opinion does not necessarily mean that the court of appeals agreed with the district court's reasoning. The Board did not believe that the doctrine of *res judicata* applied to the FOIA claim, and for that reason it concurred in petitioner's request for a remand. But for the reasons we suggest in this memorandum, the court's decision nevertheless to dismiss the appeal is an appropriate disposition of the case.

[6]"All courts, federal and state, have a broad and inherent power 'over their own process, to prevent abuses, oppression and injustice,' so 'as not to produce hardship' and to do substantial justice. * * * Utilizing its broad, inherent power, which does not depend on statute, a court will dismiss an action that is: collusive; sham; frivolous; harassing and vexatious; vexatious; vexatious and fraudulent; brought for an improper ulterior purpose; * * *" (footnotes omitted). 1 Moore's *Federal Practice*, Part 1, para. 0.60[6] (2d ed. 1977).

General Counsel of the Board explained in his letter to petitioner (Pet. App. D, pp. 10a-13a), the requested materials consist of investigatory records and intra-agency memoranda of a kind that Exemptions 5 and 7 of the FOIA (5 U.S.C. (and Supp. V) 552(b)(5) and 552(b)(7)) are designed to protect.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

JOHN S. IRVING,
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National Labor Relations Board.

OCTOBER 1977.